IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No.4 of 1994

For Approval and Signature:
HON'BLE MR.JUSTICE D.A.MEHTA Sd/-

HON'BLE MS.JUSTICE H.N.DEVANI Sd/-

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?
2	To be referred to the Reporter or not ?
3	Whether their Lordships wish to see the fair copy of the judgment ?
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
5	Whether it is to be circulated to the civil judge ?

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COMMISSIONER OF INCOME TAX - Applicant(s)
Versus
NATHIBEN R PATEL - Respondent(s)

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Appearance :
MR MANISH R BHATT for Applicant No(s).: 1.
NOTICE SERVED for Respondent No(s).: 1.

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CORAM : HON'BLE MR.JUSTICE D.A.MEHTA
and
HON'BLE MS.JUSTICE H.N.DEVANI

Date : 11/08/2005
ORAL JUDGMENT
(Per : HON'BLE MS.JUSTICE H.N.DEVANI)

1. The Income-tax Appellate Tribunal, Ahmedabad Bench 'A' has referred the following question for the opinion of this Court under Section 256(1) of the Income-tax Act, 1961 (the Act), at the instance of

the Commissioner of Income-tax, Gujarat-III, Ahmedabad.

> "Whether the Appellate Tribunal is right in law and on facts in deleting the penalty levied u/s. 271(1)(a) on the ground that the penalty for overlapping period cannot be levied ?"

2. The Assessment Years are 1982-83, 1983-84 and 1984-85. For the Assessment Year 1982-83 the relevant accounting period ended on 31st December, 1981 and hence, by virtue of the provisions of Section 139(1) of the Act, the assessee was required to furnish return of income by 30th June, 1982. The assessee filed the return of income on 16th February, 1985 and the assessment was completed under Section 143(3) of the Act on 4th November, 1985. In view of late filing of the return of income, the Assessing Officer initiated penalty proceedings under Section 271(1)(a) of the Act for failure to comply with the terms of provisions of Section 139(1) of the Act.

3. The Assessing Officer found that the assessee had failed to furnish return of income within the time stipulated under Section 139(1) of the Act without reasonable cause. It was found that the default had

continued for 25 months, and accordingly, the Assessing Officer imposed penalty at 2% of the tax for each month of default which came to Rs.18,180/-.

4. The assessee carried the matter in appeal before the Dy. CIT (Appeals) who, by his order dated 9th March, 1989, partly allowed the appeal with the following observations:

> "I have considered the arguments of the appellant carefully and I am of the opinion that although the penalty cannot be deleted in to to, but the appellant cannot be penalised for the overlapping period and the period during which the firms and A.O.Ps. in which the appellant had her share/beneficiary income, had not filed the return, following the decision of ITAT, Ahmedabad Bench in the case of M/s. Ambica Cement Products (supra) and the judgment of Delhi High Court in the case of Madan Lamba."

5. For Assessment Years 1983-84 and 1984-85 proceedings had been initiated under Section 271(1)(a) which culminated into imposition of penalty of Rs.13,220/- and Rs.4,105/- respectively. The assessee carried the matters in appeal before the Dy. CIT (Appeals), who vide separate orders dated 9th March, 1989, partly allowed the appeals.

6. The Revenue carried the matters in appeal before the Income-tax Appellate Tribunal. The Tribunal by its consolidated order dated 29th April, 1993 dismissed the appeals and upheld the orders of the Dy. CIT (Appeals).

7. Before the Tribunal, the Revenue placed reliance upon an order dated 1st September, 1992 of the Tribunal in the case of ITO Vs. M/s. Krishna Packaging, Vapi. The Tribunal found that the Dy. CIT (Appeals) had allowed the appeal of the assessee on the basis of the Tribunal's order in the case of M/s. Ambica Cement Products. The Tribunal observed that when there are two conflicting findings, the finding in favour of the citizen should be followed. Accordingly, the Tribunal was satisfied that no interference was called for with the order of the first appellate authority. The Tribunal has observed that the facts of the appeals for Assessment Years 1983-84 and 1984-85 were similar to the facts for the Assessment Year 1982-83. Accordingly, the Tribunal did not find any reason to interfere with the orders of the CIT (Appeals) for the Assessment Years 1983-84 and 1984-85 also.

8. Heard Mr.M.R.Bhatt, learned Senior Standing Counsel appearing on behalf of the applicant – Revenue. Though served there is no appearance on behalf of the respondent – assessee.

9. As can be seen, the Dy. CIT (Appeals) has allowed the appeal on two fold grounds; firstly, that the assessee cannot be penalized for the overlapping period and secondly, that penalty cannot be imposed for the period during which the firms and A.O.Ps. in which the assessee had her share/beneficiary income had not filed returns. The decision of the Dy. CIT (Appeals) is based upon the decision of the Tribunal in the case of M/s. Ambica Cement Products. The Tribunal has found that the Dy. CIT (Appeals) has recorded a finding and granted relief to the assessee on the basis of the order of the Tribunal in the case of M/s. Ambica Cement Products (supra). The Tribunal has held that when there are two conflicting findings, the one in favour of the citizen should be followed and accordingly, has upheld the order of the Dy. CIT (Appeals).

10. Mr.M.R.Bhatt has submitted that a similar question arising out of the order of the Tribunal in the case of M/s. Ambica Cement Products (supra) had been referred to this Court, and this Court by an order dated 09.02.2005 in ITR No.13 of 1993 had answered the question in favour of the Revenue and hence, the issue in question stands concluded by the said decision. Mr.Bhatt fairly pointed out that the question as to whether there was any reasonable cause for the delay in filing the return of income for the overlapping period as well as for the period, during which the firms and the AOPs in which the appellant had her share/beneficiary income, had not filed return would have to be decided by reference to the facts of each case.

11. In the aforesaid circumstances, following the ratio of the aforesaid decision, the question referred is answered in the negative i.e. in favour of the Revenue and against the assessee. However, the Tribunal shall, after giving adequate opportunity of hearing to the parties, record independent finding as to whether the assessee was prevented by a reasonable cause from filing the return of income by the due date.

12. The reference stands disposed of accordingly. There shall be no order as to costs.

Sd/-
[D.A. MEHTA, J]

Sd/-
[H.N. DEVANI, J]

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*Bhavesh**